UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JAMES LINLOR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 1:17-CV-00013(AJT/JFA)
	)	
MICHAEL POLSON,	)	
	)	
Defendant.	)	
	)	

REPLY MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY TRANSPORTATION SECURITY ADMINISTRATION'S OBJECTIONS TO MAGISTRATE JUDGE'S NON-DISPOSITIVE RULING

Pursuant to Local Rule 7(F), non-party Transportation Security Administration (TSA), through undersigned counsel, respectfully submits the instant Reply Memorandum of Law in support if its Objections to the Magistrate Judge's Non-Dispositive Ruling in the above-captioned action. For the reasons stated in its original memorandum (ECF No. 154) and below, this Court should set aside the Magistrate Judge's ruling as contrary to law or clearly erroneous.

I. INTRODUCTION

TSA requests that this Court set aside the presiding Magistrate Judge's oral ruling to the extent it directed TSA employee William Whetsell ("Mr Whetsell") to violate his obligations under applicable Department of Homeland Security's *Touhy* regulations[1] and TSA's Sensitive

[1] Under 6 C.F.R. § 5.44, a TSA employee is prohibited from producing "any document or any material acquired as part of the performance of that employee's duties or by virtue of that employee's official status, unless authorized to do so by the Office of the General Counsel or the delegates thereof, as appropriate." *See also* 6 C.F.R. § 5.47 (providing that if a court rules that a demand for production of material "must be complied with irrespective of [DHS]'s instructions not to produce the material or disclose the information sought, the employee upon whom the demand has been made shall respectfully decline to comply with the demand, citing this subpart and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)").

Security Information ("SSI") regulations[2] by producing to Plaintiff information that TSA has designated as SSI that cannot be disclosed. The SSI at issue is (1) SSI that was redacted from documents produced to Plaintiff in response to the subpoena issued to Mr. Whetsell, and (2) responsive portions of TSA's checkpoint screening SOP Manual, a document which has been designated as SSI in its entirety by TSA regulations and a specific Final Order of the TSA Administrator, and which was therefore not produced to Plaintiff.

Plaintiff appears to present three arguments in opposition to TSA's objections: (1) that because Plaintiff has not requested the *entire* SOP Manual (but only those portions of the SOP Manual that are responsive to the subpoena topics [ECF No. 134]), the TSA Administrator's Final Order is irrelevant and there is no valid SSI privilege that protects the SOP Manual from disclosure; (2) that as a self-described "certificated airline pilot," Plaintiff is entitled to receive any and all SSI under any circumstances; and (3) TSA failed to meet and confer with Plaintiff *before* filing the instant objections. For the reasons that follow, none of these arguments bear any merit.

A. The scope of the subpoena's document request is not at issue in TSA's objections.

Plaintiff appears to possibly misunderstand TSA's arguments about the applicability of a statutory privilege that protects SSI from disclosure as a challenge to the scope of the subpoena or as an argument that responsive information must be withheld on some other basis. TSA does not contest the scope of the subpoena or the relevance of the information requested, and it has not withheld any responsive information from Plaintiff for any reason other

[2] Under 49 C.F.R. § 1520.9, a TSA employee is prohibited from disclosing SSI to a non-covered person without a need to know unless authorized in writing by TSA. Consequences of unauthorized disclosure of SSI may include "a civil penalty and other enforcement or corrective action by DHS, and appropriate personnel actions," up to and including termination. *See* 49 C.F.R. § 1520.17.

than the permissible statutory SSI privilege. The subpoena sought the production of "TSA's 'standards and training guidelines, practices, and procedures' ('Guidance') related to pressure used by TSOs in passenger pat-downs of thighs, groins, and genitals in pat-downs, plus the same Guidance used to ensure that excessive force is not used in pat-downs." TSA subject-matter experts regarding training TSOs on pat-down procedures identified portions of four documents as responsive to this request. Documents were deemed responsive by performing word searches of each document to locate the terms "pressure," "excessive force," and "force."

The four responsive documents are as follows: (1) records of Defendant's On-the-Job Training ("OJT") regarding performing standard pat-downs, which TSA previously produced to Plaintiff in response to a subpoena served on the agency, TSA-000145 to TSA-000154; (2) an Instructor Manual containing the curriculum for the New Hire Training Program that Defendant completed at the time he was hired by TSA [ECF No. 154-1, at 15-20] ; (3) a TSA Online Learning Center refresher training module regarding standard pat-down procedures that Defendant completed during his employment with TSA, *id.* at 10-14; and (4) TSA's checkpoint screening SOP Manual that was in effect on March 10, 2016. TSA authorized the production to Plaintiff of the responsive portions of the first three documents, and Plaintiff has received them. Any SSI contained in the responsive portions was redacted as required by law. The responsive portions of the fourth document, the SOP Manual, cannot be produced to Plaintiff because the entirety of the SOP Manual has been designated as SSI by TSA regulations and by a specific final order of the TSA Administrator, as further explained below.

TSA objects to the Magistrate Judge's oral ruling only to the extent that it requires TSA to produce to Plaintiff the responsive portions of the SOP Manual (which is SSI in its entirety) or

the SSI-redacted information from the documents already produced to Plaintiff as responsive to the subpoena at issue.

B. Pursuant to a Final Order issued by TSA's Administrator, no part of the SOP Manual can be disclosed.

Plaintiff first avers that TSA's position is untenable because he did not seek "TSA's entire SOP" and instead sought only what he describes as a "sliver of relevant information" found therein. [ECF No. 160, at 2]. In essence, it appears that Plaintiff is arguing that because his subpoena *duces tecum* did not specifically request the *entire* SOP Manual, TSA's objections should be rejected. Plaintiff's arguments are meritless, and further highlight why the Magistrate Judge's oral ruling is clearly erroneous or contrary to law.

Plaintiff's first argument – *i.e.*, that his subpoena was "modest and specific" and did not request the *entire* of the SOP Manual, *id.* at 3 – is somewhat difficult to understand. Whether requested in full or in part, the SOP Manual – in its entirety – has been designated by the TSA Administrator as SSI in a final order. Plaintiff simply fails to recognize the effect of the TSA Administrator's Final Order, initially issued on December 8, 2009, and reaffirmed on January 18, 2017 [ECF No. 154-1, at 2-8]. This Order specifically listed seven (7) documents, including the SOP Manual (identified as the "Screening Checkpoint SOP"), and unequivocally determined and ordered that all versions of these documents, including drafts and versions no longer in effect, are "to be protected as SSI in their entirety, pursuant to 49 U.S.C. § 114(r) and 49 CFR § 1520.5(b)(9)(i)." [ECF No. 154-1, at 8]. Based upon this Final Order, TSA (and its employees) cannot release the SOP Manual, in whole or in part, even in a redacted form, in response to any FOIA or discovery request. *Id.* at 4-5, 7-8. Thus, the mere fact that Plaintiff has only requested information contained in a particular *portion* of the SOP Manual is not relevant to the SSI analysis.

To the extent that Plaintiff's arguments might be read as suggesting that the portions of the SOP Manual that are responsive to the subpoena should not be considered SSI[3], this Court lacks jurisdiction to address the question. A Final Order issued by TSA's Administrator has designated all parts of the SOP Manual as SSI that cannot be disclosed, and an argument that a particular "sliver" of the SOP Manual should not be SSI is a direct challenge to the Final Order. The Fourth Circuit, along with all other courts that have addressed the issue, has recognized and affirmed that 49 U.S.C. § 46110 vests exclusive jurisdiction over a challenge to a TSA final order with an appropriate court of appeals. *Blitz v. Napolitano*, 700 F.3d 733, 741 (4th Cir. 2012).[4] This means that no court – other than an appropriate court of appeals – may exercise jurisdiction to review or modify TSA's final order designating material as SSI, *id.* at 743, which includes the Final Order precluding the release of the SOP Manual in its entirety or in part (including in a redacted form).

The Final Order issued by TSA's Administrator also answers Plaintiff's alternative argument that the agency has not explained how the SOP Manual is SSI. *See* ECF No. 160, at 3 (arguing that TSA has not "explained how the specific items requested are SSI").[5] The Final

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[3] *See* [ECF No. 160, at 2] (arguing that "TSA has no reason to designate the sliver of information requested" as SSI).

[4] TSA's SSI authority in 49 USC 114(r) (formerly (s)), is explicitly identified as a statutory basis for orders that are exclusively reviewable by a court of appeals under the terms of 49 U.S.C. § 46110.

[5] Additionally, Plaintiff, relying on an inapposite FOIA case from the Northern District of California, *Gordon v. FBI*, 390 F. Supp. 2d 897 (N.D. Cal. 2004), claims that TSA is obligated to meet a "pleading standard" in order to demonstrate that information is SSI. *See* [ECF No. 160, at 3]. The "pleading standard" Plaintiff refers to in *Gordon* was in fact the burden of proving on summary judgment the applicability of FOIA exemption (b)(3) to material designated as SSI. After a "preliminary review" of the government's motion for summary judgment, the *Gordon* court found that the burden of proof was not satisfied, and ordered the "appropriate remedy" that TSA "provide a detailed affidavit explaining why . . . particular material" is SSI that is exempt from FOIA disclosure. *Id.* at 902. When the government filed a revised motion for summary

Order does in fact provide such an explanation. And all that matters for instant purposes is that the TSA Administrator has issued a Final Order designating the SOP Manual as SSI, and this Court lacks subject-matter jurisdiction to review that order. As further authority for this point, TSA incorporates its arguments made in its initial memorandum of law [ECF No. 154, at 5-8] by reference. Nothing in Plaintiff's response refutes the fact that this Court is unable to review the TSA order at issue.

Thus, the Magistrate Judge's oral ruling directing production of responsive portions of the SOP Manual is contrary to law and must be set aside. When a Final Order of the TSA Administrator designates material as SSI, TSA employees are prohibited by 49 U.S.C. § 114(r) and 49 C.F.R. § 1520.9 from disclosing that material to a non-covered person without a need to know, and under 49 U.S.C. § 46110, district courts lack jurisdiction to modify or set aside the Final Order.

C. Plaintiff does not have an all-access pass to SSI by way of being a self-described "*certificated airline pilot*"

Plaintiff next argues that he is approved to receive SSI based upon his bald claim that he is a "certificated airline pilot." [ECF No. 160, at 4]. In essence, Plaintiff argues that he is a "covered person" under 49 C.F.R. § 1520.7, and as such, that he may receive SSI at any time and for all purposes.

This argument is meritless for several reasons. First, neither TSA nor this Court has been presented with any evidence (other than Plaintiff's own bald statements) to substantiate the

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judgment supported by a detailed affidavit from TSA, the *Gordon* court granted the motion and held that TSA "properly withheld" SSI when responding to the plaintiff's FOIA request. 388 F. Supp. 2d 1028, 1035 (N.D. Cal. 2005). The *Gordon* court neither ordered the disclosure of SSI nor found that information designated as SSI was not in fact SSI. Nothing in *Gordon* stands for the proposition that TSA must do more than show the existence of a Final Order designating particular information as SSI.

notion that Plaintiff is a "certificated airline pilot" who may receive SSI as a "covered person."[6] Plaintiff bears the burden to demonstrate that he is a "covered person" under the SSI regulations, and without any evidence to this effect, Plaintiff fails to meet his burden. Simply claiming to be a "certificated" pilot, without more, falls well short of satisfying the criteria required for covered person status set forth in 49 C.F.R. §§ 1520.7(a)- (b) (defining certain aviation entities as covered parties), or (k) (defining current or former employees of those entities as covered parties).

Even assuming, *arguendo*, that Plaintiff could present evidence sufficient to meet the regulatory definition of being a "covered person," that status does not give him an "all access pass" to SSI. Instead, a "covered person" is only entitled to the specific SSI that he or she has a "need to know" in order to perform his or her job duties. *See* 49 C.F.R. §§ 1520.11(a)(1)-(3). For instance, even if Plaintiff were a pilot for a commercial airline, he would not be authorized to access SSI related to security checkpoint procedures, because checkpoint security is not directly related to the functions of an airline pilot and he would not have a need to know checkpoint screening procedures in order to perform his job or his attendant transportation security responsibilities.

And while Plaintiff attempts to rely upon 49 C.F.R. §§ 1520.11(a)(4)-(5), as affording him a "need to know" SSI in this case, a review of these provisions shows that they are inapplicable to the Plaintiff. First, 49 C.F.R. § 1520.11(a)(4), provides that an individual has a "need to know" if he or she is engaged to provide "technical or legal advice to a covered person

[6] To this point, on October 30, 2017, Plaintiff, the undersigned counsel, and a TSA attorney-advisor, Nathan Bryant, met and conferred by phone concerning TSA's objections. TSA requested support from Plaintiff concerning his claim that he is a "covered person" for purposes of SSI; specifically, it requested information concerning Plaintiff's employment history in his capacity as a "certificated airline pilot." Plaintiff refused to provide any such information.

regarding transportation security requirements of Federal Law." This provision concerns SSI that a "covered person" is authorized to receive by virtue of the covered person's job. In other words, this provision does not permit the person providing the technical or legal advice to choose any and all SSI unrelated to the covered person's job functions and responsibilities, but that SSI is tied to the covered person's position.

Likewise, 49 C.F.R. § 1520.11(a)(5) provides that an individual has a "need to know" if he or she is engaged "to represent a covered person in connection with any judicial or administrative proceeding regarding those requirements." This concerns SSI that a covered person would ordinarily have access to, where there is a judicial or administrative proceeding regarding the transportation security requirements of federal law. This case does not involve SSI that the Plaintiff already has access to, and as such, these provisions are inapplicable to him. Simply put, the Plaintiff is not a "covered person" with a "need to know," and as such, he is not entitled to access the SOP Manual – whether in whole or in part – or the SSI redacted from the materials that have been produced to him.

However, as indicated in TSA's initial memorandum of law [ECF No. 154, at 9-10], there is a process in place (pursuant to Section 525(d)) that could potentially permit Plaintiff to access relevant SSI in this case, including the portions of the SOP Manual that are responsive to the subpoena. Plaintiff has not attempted to use this process; indeed, during an October 30, 2017, meet-and-confer conference, Plaintiff declined TSA's offer to begin the process. Given that Plaintiff is not a covered person with a need to know under the SSI regulations, and given that he has declined to pursue access to SSI under Section 525(d),[7] the Magistrate Judge's ruling

[7] In particular, because Plaintiff has not availed himself of this option, TSA has not conducted the appropriate criminal history check and terrorist assessment as required by Section 525(d). Nor did the Magistrate Judge enter "an order that protects the SSI from unauthorized or unnecessary disclosure and specifies the terms and conditions of access." *See Ibrahim v. Dep't of*

directing the disclosure of SSI to Plaintiff is clearly erroneous or contrary to law. Plaintiff's response fails to show that he meets the regulatory definitions of a covered person with a need to know, and it fails to show how Section 525(d) was adhered to in this case. As such, TSA's objections are proper, and the Magistrate Judge's oral ruling should be set aside.[8]

D. TSA Has Met and Conferred with Plaintiff Concerning These Objections.

Finally, Plaintiff argues that this Court should reject TSA's objections and uphold the Magistrate Judge's ruling because TSA did not meet and confer with the Plaintiff prior to filing its objections. [ECF No. 160, at 1]. This argument fails for several reasons.

First, Plaintiff disregards the emergency nature of the objections at the time that TSA filed them. The Magistrate Judge's ruling on TSA's Motion to Quash was issued on October 19, 2017, a mere twenty-four hours before the subpoena in question required the production (at a deposition) of SSI that was the subject of that very ruling. Plaintiff had previously advised undersigned counsel, that he was traveling cross-country and was not scheduled to arrive in Virginia until "late" on Thursday, October 19, 2017. TSA rightfully filed its objections to the Magistrate Judge's ruling on an "emergency basis" on Friday, October 20, 2017, before the start of Mr. Whetsell's deposition.

Second, TSA voluntarily sought to postpone this Court's consideration of its objections until it had the opportunity to meet and confer with Plaintiff about them [ECF No. 161]. And

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Homeland Sec., 2009 U.S. Dist. LEXIS 122598 **28-39 (N.D. Cal. Dec. 17, 2009) (setting forth a court's requirements and obligations under Section 525(d)).

[8] Plaintiff also argues that Mr. Whetsell was served in his individual capacity and TSA has no standing to object to the magistrate's oral ruling. *See* ECF No. 160, at 6-8. But Mr. Whetsell only has possession, custody or control of the responsive information in his official capacity as a Supervisory Transportation Security Officer employed by TSA. Moreover, nothing the Plaintiff asserts in his response refutes the arguments made by TSA in its initial memorandum of law. *See* ECF No. 154, at 12-14. As such, TSA incorporates those arguments by reference.

since this Court granted TSA's request for a continuance of the hearing on its objections, TSA counsel met and conferred with Plaintiff about its underlying motion to quash and the Magistrate Judge's ruling on the same. As stated above, on October 30, 2017, undersigned counsel for TSA, and an attorney employed by TSA directly, conferred with Plaintiff about these issues telephonically. During this call, TSA (1) requested employment history information that could be used to confirm the veracity of Plaintiff's claims regarding his ability to access SSI, but Plaintiff declined to provide any information, and (2) advised Plaintiff that he could seek to avail himself of the process offered by section 525(d) in order to obtain SSI for purposes of this litigation, but Plaintiff again declined. TSA has thus completely fulfilled its meet and confer obligations in this regard.

II. CONCLUSION

For the foregoing reasons and the reasons stated in TSA's initial memorandum of law, the Magistrate Judge's order should be set aside because it is clearly erroneous or contrary to law.

Respectfully submitted,

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By: _____/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following via certified mail, and via facsimile on October 31, 2017, at the following address:

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